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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 JASON DAVIS,

10 Petitioner,

Case No. C15-699-RSL-JPD

11 v.

REPORT AND RECOMMENDATION

12 PATRICK GLEBE,

Respondent.

13
14 INTRODUCTION AND SUMMARY CONCLUSION

15 Petitioner Jason Davis is a state prisoner who is currently confined at the Monroe
16 Correctional Complex in Monroe, Washington. He seeks relief under 28 U.S.C. § 2254 from a
17 2011 King County Superior Court judgment and sentence. Respondent has filed an answer
18 responding to petitioner's federal habeas claims, and has submitted relevant portions of the state
19 court record. This Court, having carefully reviewed petitioner's petition, respondent's answer,
20 and the balance of the record, concludes that petitioner's petition for writ of habeas corpus
21 should be denied and this action should be dismissed with prejudice.
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FACTUAL BACKGROUND

The Washington Court of Appeals, on direct appeal, summarized the facts underlying petitioner's conviction as follows:

Jason Waldon Davis and Stacy Hill were involved in a dating relationship and lived together for a number of years. By early 2010, their romantic relationship had ended. Davis moved out of Hill's house over the weekend of April 3 and 4.

Late in the evening of April 5, Hill and Chad Andrews were in her bedroom with the door locked. Davis entered the house uninvited and with a knife. Davis broke down Hill's bedroom door and attacked Andrews in the back with the knife, stabbing him between 11 and 14 times.

On April 8, the State charged Davis with assault in the first degree with a deadly weapon and burglary in the first degree. The court entered an order prohibiting Davis from having contact with either Andrews or Hill.

On March 18, 2011, the State filed an amended information to add a charge of attempted murder in the second degree with a deadly weapon, as well as a deadly weapon enhancement to the burglary charge.

On April 22, Davis entered an Alford¹ plea to the charge of assault in the first degree with a deadly weapon. During the plea hearing, the prosecutor and the court asked Davis twice whether he had been threatened or coerced into pleading guilty. In response, Davis twice unequivocally denied that he was being threatened. After accepting the plea as knowingly, intelligently, and voluntarily made, the court lifted the no-contact order with Hill.

On June 10, Davis filed a motion to withdraw his guilty plea. Davis claimed his plea was not voluntary because Andrews repeatedly made threats to kill him and harm his friends. The court held an evidentiary hearing. Stacy Hill, Davis's mother Kim Myhre, and Davis testified. The court admitted into evidence transcripts of telephone calls Davis made from the jail to Hill, Myhre, and Hill's mother.

Hill testified that Andrews repeatedly threatened to kill Davis and that she told Davis's mother about the threats.

¹ [Court of Appeals footnote 1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

1 Myhre testified that when she came to Hill's house to remove Davis's
2 belongings, Andrews told her, "[Y]ou better hope he goes to prison for a long
3 time because he's safer in there than he is on the streets because me and my posse
4 are going to take care of him." Myhre also testified that she told Davis about the
5 threat she heard from Andrews as well as those reported to her by Hill.

6 Davis testified that he pleaded guilty for a number of reasons.
7 Specifically, Davis said he wanted the case to end, his attorneys told him he had
8 no defense, he wanted to see Hill's son, and he knew the protection order would
9 be lifted if he pleaded guilty. Davis testified that he feared Hill, her son, and his
10 friend John Mayfield would be in danger if Hill testified at trial. Davis testified
11 that he pleaded guilty to placate Andrews and that he would not have pleaded
12 guilty if Andrews had not threatened him.

13 Davis also introduced into evidence transcripts of several telephone calls
14 he made from the jail to Myhre and Hill. In a telephone call to his mother on
15 April 6, Davis referred to "death threats" by "this guy who wants to kill me,"
16 saying that "if that's his position and he wants to do that . . . I'm kind of okay
17 with that . . . in the sense that . . . let me get out, . . . get a No-Contact Order and
18 then if he gets anywhere near me then . . . I'll just call the police." After entering
19 the plea, Davis explained his decision to plead to Myhre, noting "other things we
20 can't talk about," and then saying, "[T]he only reason I took it was because . . .
21 the other option . . . was to go in to trial with literally no defense."

22 In a telephone call to Hill on May 8, 2011, Davis told Hill that her
23 "version of the truth was maybe not as close to reality as would have been helpful
or as I would have liked," and "I can understand why you may have been
confused about some things." Davis also told Hill she could help him "if this all
goes to trial."

The court issued a detailed, 10-page written order denying Davis's motion
to withdraw his plea. The court found that Davis's "explanation of how the
threats caused him to plead guilty makes no sense" and was "not credible." The
court found that Davis did not fear danger to himself from Andrews' threats but
feared that Andrews would not testify truthfully. The court also found that
Davis's "assertion that he pled guilty to protect Stacy Hill, her son [R.H.], and
John May[field] is not credible." The court concluded:

[T]he true motivation for defendant's motion to withdraw his plea
is that after the no contact order was lifted and he attempted to
tamper with Ms. Hill's testimony, he came to believe he could win
his case with a claim of self-defense.

1 The court also states that the plea bargain substantially reduced Davis's standard-
2 range sentence. The court determined that Davis was not coerced into pleading
guilty by Andrews' threats and denied the motion to withdraw the guilty plea.

3 (Dkt. 27, Ex. 3 at 1-4.)

4 PROCEDURAL BACKGROUND

5 Petitioner was sentenced on August 19, 2011 to a term of 93 months confinement on the
6 first degree assault charge and to an additional 24 month deadly weapon enhancement, for a total
7 of 117 months confinement. (*See id.*, Ex. 1.) Petitioner appealed his judgment and sentence to
8 the Washington Court of Appeals. (*See id.*, Exs. 4-6.) The single issue raised by petitioner on
9 direct appeal was that the trial court erred when it denied his motion to withdraw his guilty plea.
10 (*See id.* at 4-5.) On November 19, 2012, the Washington Court of Appeals issued an
11 unpublished opinion affirming petitioner's conviction. (*Id.*, Ex. 3.) Petitioner thereafter filed a
12 motion for reconsideration of the Court of Appeals' decision denying his direct appeal, but that
13 motion was denied without comment on February 25, 2013. (*Id.*, Exs. 7-8.) Petitioner next
14 sought review in the Washington Supreme Court. (*Id.*, Ex. 9.) However, petitioner's petition
15 for review was not timely filed and his motion for extension of time was denied, thereby ending
16 proceedings in the Supreme Court. (*Id.*, Exs. 10-11.) The Court of Appeals issued its mandate
17 terminating petitioner's direct review on October 30, 2013. (*Id.*, Ex. 12.)

18 On October 6, 2014, petitioner filed a personal restraint petition in the Washington Court
19 of Appeals in which he argued that the deadly weapon enhancement violated double jeopardy
20 principles and that he was denied effective assistance of counsel during plea negotiations. (*See*
21 *id.*, Ex. 13.) On November 24, 2014, the Court of Appeals issued an order dismissing the
22 petition. (*Id.*, Ex. 14.) Petitioner thereafter filed a motion for discretionary review in the
23 Washington Supreme Court in which he again argued that he was denied effective assistance of

1 counsel in plea negotiations and that the deadly weapon enhancement he received violated
2 double jeopardy principles. (Dkt. 27, Ex. 15.)

3 The Washington Supreme Court issued a ruling denying review on July 28, 2015. (*Id.*,
4 Ex. 16.) And, the Court of Appeals issued a certificate of finality in petitioner's personal
5 restraint proceedings on October 7, 2015. (*Id.*, Ex. 17.) Petitioner now seeks federal habeas
6 review of his conviction.

7 GROUND FOR RELIEF

8 Petitioner identifies the following three grounds for relief in his petition for writ of
9 habeas corpus:

10 **GROUND ONE:** The court erred in denying Mr. Davis' motion to withdraw
11 his plea.

12 **GROUND TWO:** The weapon enhancement violates Double Jeopardy.

13 **GROUND THREE:** Counsel was ineffective during plea negotiations.

14 (*See* Dkt. 8 at 5-8.)

15 DISCUSSION

16 Respondent concedes in his answer to the petition that petitioner exhausted his second
17 and third grounds for relief, but argues that petitioner failed to exhaust his first ground for relief
18 because he failed to properly raise the claim at every level of the state courts' review.
19 Respondent further argues that petitioner's first ground for relief is now procedurally barred
20 under Washington law, and that his second and third grounds for relief were reasonably rejected
21 by the state courts. Petitioner has not filed any response to respondent's answer.

Exhaustion and Procedural Default

A state prisoner is required to exhaust all available state court remedies before seeking a federal writ of habeas corpus. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the state courts “an initial opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal quotation marks and citations omitted). In order to provide the state courts with the requisite “opportunity” to consider his federal claims, a prisoner must “fairly present” his claims to each appropriate state court for review, including a state supreme court with powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

It is not enough that all the facts necessary to support a prisoner’s federal claim were before the state courts or that a somewhat similar state law claim was made. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). The habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claims. *Id.*

A habeas petitioner who fails to meet a state’s procedural requirements for presenting his federal claims deprives the state courts of the opportunity to address those claims in the first instance. See *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Presenting a new claim to the state’s highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation of the claim for exhaustion purposes. *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994), citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

1 Petitioner asserts in his first ground for relief that the trial court erred in denying his
2 motion to withdraw his guilty plea. Respondent argues that petitioner failed to exhaust his first
3 ground for relief because he did not raise his claim in the Washington Supreme Court and
4 therefore failed to invoke one complete round of the state's established appellate review process
5 as is necessary to satisfy the exhaustion requirement.

6 The state court record reveals that petitioner presented his first ground for relief to the
7 Washington Court of Appeals on direct review. However, though petitioner included a version
8 of the same claim in his petition for review to the Washington Supreme Court, the petition for
9 review was deemed untimely and, thus, the merits of the claim were never considered by the
10 court. (*See* Dkt. 27, Exs. 9, 11.) Petitioner again made reference to the trial court's order on his
11 motion to withdraw his guilty plea in his personal restraint petition, but he did not appear to
12 assert any independent claim of trial court error concerning the guilty plea. (*Se id.*, Ex. 13 at 1,
13 13-28.) Petitioner confirms this fact in his motion for discretionary review where he states that
14 he did not intend to re-raise the issue concerning the duress challenge to his guilty plea in his
15 personal restraint petition, and that he only reasserted a portion of the argument for exhaustion
16 purposes. (*Id.*, Ex. 15 at 3.) The state courts, on collateral review, did not address any claim of
17 trial court error relating to petitioner's motion to withdraw his guilty plea which reinforces the
18 conclusion that petitioner was not deemed to have presented any such claim in those
19 proceedings. As the record makes clear that petitioner never fairly presented his first ground for
20 relief to the Washington Supreme Court for consideration, this Court must conclude that the
21 claim was not properly exhausted.

22 Respondent argues that petitioner, having failed to properly exhaust his first ground for
23 relief, would now be barred from presenting his claim to the state courts under RCW 10.73.090

(time bar), RCW 10.73.140 (successive petition bar), and RAP 16.4(d). RCW 10.73.090(1) provides that a petition for collateral attack on a judgment and sentence in a criminal case must be filed within one year after the judgment becomes final. Petitioner's conviction became final for purposes of state law on October 30, 2013, the date the Court of Appeals issued its mandate terminating direct review. It therefore appears clear that petitioner would now be time barred from returning to the state courts to present his unexhausted claim. *See* RCW 10.73.090. In addition, because petitioner previously pursued a collateral challenge in the state courts, the state courts are not likely to entertain another such challenge from petitioner. *See* RCW 10.73.140. This Court therefore concludes that petitioner has procedurally defaulted on his first ground for relief.

When a state prisoner defaults on his federal claims in state court, pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or can demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Petitioner makes no effort to demonstrate cause or prejudice for his default. He therefore fails to demonstrate that his claim that the trial court erred in denying his motion to withdraw his guilty plea is eligible for federal habeas review. Accordingly, this Court recommends that petitioner's federal habeas petition be denied with respect to his first ground for relief.

Standard of Review for Exhausted Claims

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was contrary to, or involved an unreasonable application of, clearly

1 established federal law, as determined by the Supreme Court, or if the decision was based on an
2 unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

3 Under the “contrary to” clause, a federal habeas court may grant the writ only if the state
4 court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law,
5 or if the state court decides a case differently than the Supreme Court has on a set of materially
6 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the
7 “unreasonable application” clause, a federal habeas court may grant the writ only if the state
8 court identifies the correct governing legal principle from the Supreme Court's decisions, but
9 unreasonably applies that principle to the facts of the prisoner’s case. *See id.* at 407-09. “The
10 ‘unreasonable application’ clause requires the state court decision to be more than incorrect or
11 erroneous.” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citations omitted). A state court’s
12 decision may be overturned only if the application is “objectively unreasonable.” *Id.*

13 Clearly established federal law, for purposes of AEDPA, means “the governing legal
14 principle or principles set forth by the Supreme Court at the time the state court render[ed] its
15 decision.” *Id.* at 71-72. “If no Supreme Court precedent creates clearly established federal law
16 relating to the legal issue the habeas petitioner raised in state court, the state court’s decision
17 cannot be contrary to or an unreasonable application of clearly established federal law.” *Brewer*
18 *v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (citing *Dows v. Wood*, 211 F.3d 480, 485-86 (9th Cir.
19 2000)).

20 In considering a habeas petition, this Court’s review “is limited to the record that was
21 before the state court that adjudicated the claim on the merits.” *Cullen*, 131 S. Ct. at 1398-1400,
22 1415. If a habeas petitioner challenges the determination of a factual issue by a state court, such
23

determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Ground Two: Double Jeopardy

Petitioner asserts in his second ground for federal habeas relief that his rights under the Double Jeopardy Clause were violated by a weapons enhancement which increased the length of his sentence by 24 months. (*See* Dkt. 8 at 7, 48-54.)

The Fifth Amendment to the United States Constitution guarantees that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. Amend V. The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after conviction, a second prosecution for the same offense after acquittal, and multiple punishments for the same offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Where multiple punishments are imposed in a single criminal trial, the role of the Double Jeopardy Clause “is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (citing *Gore v. United States*, 357 U.S. 386 (1958); *Bell v. United States*, 349 U.S. 81 (1955); and *Ex parte Lange*, 18 Wall 163 (1874)). *See also, Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”)

Petitioner presented his double jeopardy claim to the state courts in his personal restraint proceedings and the state courts rejected that claim. The Washington Supreme Court Commissioner explained her conclusion as follows:

1 Mr. Davis argues that the deadly weapon sentence enhancement constitutes
2 double jeopardy in light of the Supreme Court's decision in *Alleyne v. United*
3 *States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), where the Court held that facts
4 that increase the mandatory minimum sentence for a crime must be found by a
5 jury beyond a reasonable doubt. *Id.* at 2158. In so holding, the Court overruled
6 its decision in *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed.
7 2d 524 (2002). But *Alleyne* does not concern double jeopardy. Under double
8 jeopardy analysis, the central question is whether the legislature intended the
9 punishment imposed. *See State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773
10 (2010). Since the legislature plainly intended to impose a deadly weapon
11 sentence enhancement even when use of a deadly weapon is an element of the
12 underlying crime, such an enhancement does not violate double jeopardy
13 principles. *Id.* at 78-80. The acting chief judge therefore properly dismissed the
14 petition.

15 (Dkt. 27, Ex. 16 at 3.)

16 The decision of the state courts is entirely consistent with federal law. A review of
17 applicable Washington state law makes clear that the Washington legislature intended that an
18 individual found to have committed a felony offense while armed with a deadly weapon would
19 receive additional time. *See* RCW 9.94A.533(4). The legislature also made clear that the deadly
20 weapon enhancements were mandatory and were to run consecutively to all other sentencing
21 provisions. RCW 9.94A.533(4)(a). Thus, as the Washington Supreme Court properly
22 concluded, petitioner's deadly weapon enhancement did not violate double jeopardy principles
23 because petitioner's punishment did not exceed that which was clearly intended by the
legislature. Petitioner's federal habeas petition should therefore be denied with respect to his
second ground for relief.

24 Ground Three: Ineffective Assistance of Trial Counsel

25 Petitioner asserts in his third ground for relief that his attorneys rendered ineffective
26 assistance during plea negotiations when they erroneously told him that he had no defense to the
27 burglary charge. (*See* Dkt. 8 at 8, 67-70.) Petitioner maintains that if he had known he had a

1 defense to that charge, and to the accompanying deadly weapon enhancement, he would have
2 gone to trial. (Dkt. 8 at 69.) Petitioner reasons that if he were to “beat” the burglary charge,
3 either by having the charge dismissed prior to trial or by being acquitted on the charge at trial, he
4 would have had a lower standard sentencing range even if he had been convicted on the
5 attempted murder charge.² (*Id.*)

6 Due process requires that a guilty plea be both knowing and voluntary. *Boykin v.*
7 *Alabama*, 395 U.S. 238, 242 (1969). “The longstanding test for determining the validity of a
8 guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the
9 alternative courses of action open to the defendant.’” *Hill v. Lockhart*, 474 U.S. 52, 56
10 (1985)(quoting *Alford v. North Carolina*, 400 U.S. 25, 31 (1970)). A defendant who enters a
11 guilty plea on advice of counsel may only attack the voluntary and intelligent character of the
12 plea by demonstrating that the advice received from counsel was not within the range of
13 competence demanded of attorneys in criminal cases. *Shah v. United States*, 878 F.2d 1156,1158
14 (9th Cir. 1989).

15 Ineffective assistance of counsel claims arising out of the plea process are evaluated
16 under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hill*, 474
17 U.S. at 56. Under *Strickland*, a defendant must prove (1) that counsel's performance fell below
18 an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for
19 counsel's error, the result of the proceedings would have been different. *Strickland*, 466 U.S. at
20 687. There is a strong presumption that counsel's performance fell within the wide range of
21 reasonably effective assistance. *Id.* at 689.

22 ² While respondent appears to construe petitioner’s ineffective assistance of counsel claim as also asserting
23 that petitioner had a self-defense argument with respect to the assault charge (*see* Dkt. 24 at 20), the court finds no
reference to such a claim in petitioner’s supporting materials (*see* Dkt. 8, Ex. 2).

1 With respect to the first prong of the *Strickland* test, a petitioner must show that counsel's
2 performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.
3 Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. "A fair
4 assessment of attorney performance requires that every effort be made to eliminate the distorting
5 effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to
6 evaluate the conduct from counsel's perspective at the time." *Id.* In order to prevail on an
7 ineffective assistance of counsel claim, a petition must overcome the presumption that counsel's
8 challenged actions might be considered sound strategy. *Id.*

9 The second prong of the *Strickland* test requires a showing of actual prejudice related to
10 counsel's performance. In order to satisfy the "prejudice" requirement of the *Strickland* standard
11 in the context of guilty pleas, a petitioner must demonstrate that it is reasonably probable that,
12 but for counsel's errors, "he would not have pleaded guilty and would have insisted on going to
13 trial." *Hill*, 474 U.S. at 59.

14 While the Supreme Court established in *Strickland* the legal principles that govern claims
15 of ineffective assistance of counsel, it is not the role of the federal habeas court to evaluate
16 whether defense counsel's performance fell below the *Strickland* standard. *Harrington v.*
17 *Richter*, 131 S. Ct. 770, 785 (2011). Rather, when considering an ineffective assistance of
18 counsel claim on federal habeas review, "[t]he pivotal question is whether the state court's
19 application of the *Strickland* standard was unreasonable." *Id.* As the Supreme Court explained
20 in *Harrington*, "[a] state court must be granted a deference and latitude that are not in operation
21 when the case involves review under the *Strickland* standard itself." *Id.*

1 Petitioner presented his ineffective assistance of counsel claim to the state courts in his
2 personal restraint proceedings and the state courts rejected the claim. The Washington Supreme
3 Court Commissioner explained her conclusion as follows:

4 Mr. Davis asserts that defense counsel should have advised him that the
5 State could not prove burglary because he had a key to Ms. Hill's home with her
6 knowledge and consent and some of his personal property was still located in the
7 home, including items in her bedroom. He claims he considered Ms. Hill's house
8 to be his home. In support of his petition, Mr. Davis included portions of a
transcript of Ms. Hill's police interview, in which she told police she did not
believe it was burglary, that Mr. Davis retained a key to the home after having
lived there for several years, and that he visited two or three days a week after
work to spend time with her son.

9 Mr. Davis must show that counsel's performance fell below an objective
10 standard of reasonableness in light of all the circumstances, and that in the
11 absence of counsel's deficient performance there is a reasonable probability that
12 the result of the proceeding would have been different. *In re Pers. Restraint of*
13 *Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012); *Strickland v. Washington*, 466
14 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance
15 is not shown by matters that go to trial strategy or tactics. *State v. Hendrickson*,
16 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Mr. Davis fails to demonstrate that
17 counsel did not investigate the facts. Moreover, Mr. Davis ignores the portions of
18 Ms. Hill's statement where she explained that Mr. Davis was no longer living in
the home at the time of the assault, and that although he still visited after work
two or three days a week, he was not expected to visit on that day. Moreover, Ms.
Hill explained that she and her friend so feared Mr. Davis that they put furniture
under the front door knob and locked the bedroom door before retiring to the
bedroom. These facts were sufficient to demonstrate that Mr. Davis was
uninvited and that he entered the home with felonious intent. Accordingly,
counsel was not deficient in failing to advise Mr. Davis that the State could not
prove burglary.

19 (Dkt. 27, Ex. 16 at 2-3.)

20 Petitioner makes no showing that this decision of the state courts was contrary to, or
21 constituted an unreasonable application of, United States Supreme Court precedent. The record
22 before this Court reveals that petitioner first attempted to withdraw his guilty plea in this matter,
23 prior to sentencing, on the grounds that the plea was not voluntary because the victim had made

1 threats to kill petitioner and harm his friends. (*See* Dkt. 27, Ex. 19.) When that effort was
2 unsuccessful, petitioner attempted to undermine the validity of his guilty plea by claiming in his
3 personal restraint proceedings that his attorneys erroneously told him that he had no defense to
4 the burglary charge. However, the fact that petitioner now believes he would have had a strong
5 defense to the burglary charge does not mean that his attorneys, in their reasonable professional
6 judgment, concurred with such an assessment.

7 The facts sets forth in the certification for determination of probable cause, which
8 petitioner adopted as a part of his plea agreement, would certainly appear to support an
9 assessment that petitioner was unlikely to prevail on the burglary charge at trial. (*See id.*, Ex.
10 18.) And, as the state courts pointed out in their decisions rejecting petitioner's ineffective
11 assistance of counsel claim, petitioner offers no evidence that his attorneys failed to investigate
12 all of the facts surrounding the burglary charge, including the statements of Ms. Hill upon which
13 petitioner relies to support his claim that he had a strong defense, before advising petitioner that
14 he had no defense to the burglary charge. (*See id.*, Ex. 14 at 6, Ex. 16 at 2-3.) Petitioner makes
15 no showing that counsel's performance was deficient. He has, at most, put at issue a decision on
16 a strategic matter which is beyond the purview of a reviewing court.

17 Petitioner also fails to demonstrate any prejudice. While petitioner contends now that
18 absent counsel's erroneous advice he would have insisted on going to trial, the record does not
19 support such an assertion. Prior to entering his guilty plea, petitioner was facing three charges,
20 including a charge of attempted murder in the second degree. Petitioner's standard sentence
21 range for the first degree assault charge to which he pleaded guilty was 117 to 147 months, and
22 petitioner received the low end recommendation. (*See* Dkt. 27, Ex. 18 at 8-11.) Had petitioner
23 proceeded to trial, and been convicted on all charges, his standard range sentence would have

1 been 156 to 231 months, a potential sentence almost double that which he received by pleading
2 guilty. (See Dkt. 27, Ex. 6 at 12.) Petitioner's after-the-fact speculation that he would have been
3 better off proceeding to trial and risking conviction on the attempted murder charge disregards
4 the very real risk that he might have been convicted on the burglary charge, with an additional
5 weapon enhancement, regardless of his new found belief in the strength of his defense to the
6 burglary charge. The state courts reasonably rejected petitioner's ineffective assistance of
7 counsel claim and, thus, petitioner's federal habeas petition should be denied with respect to his
8 third ground for relief.

9 Certificate of Appealability

10 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
11 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)
12 from a district or circuit judge. A certificate of appealability may issue only where a petitioner
13 has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C.
14 § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could
15 disagree with the district court's resolution of his constitutional claims or that jurists could
16 conclude the issues presented are adequate to deserve encouragement to proceed further."
17 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that
18 petitioner is not entitled to a certificate of appealability with respect to any of the claims asserted
19 in his petition.

20 CONCLUSION

21 For the reasons set forth above, this Court recommends that petitioner's petition for writ
22 of habeas corpus be denied and that this action be dismissed with prejudice. This Court also
23

This Report and Recommendation is not an appealable order. Thus, a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge acts on this Report and Recommendation.

James P. Donohue
 JAMES P. DONOHUE
 Chief United States Magistrate Judge